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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. RYAN ANDREW FIERRO, Defendant and Appellant.	E057818 (Super.Ct.No. FWV1201937) OPINION

APPEAL from the Superior Court of San Bernardino County. Stephan G. Saleson, Judge. Affirmed.

Ann Bergen, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Eric A. Swenson and Warren Williams, Deputy Attorneys General, for Plaintiff and Respondent.

In this appeal, defendant and appellant Ryan Andrew Fierro challenges the sufficiency of the evidence to support his conviction for assault with a deadly weapon (Pen. Code,[1] § 245, subd. (a)(1)), contending there was a reasonable doubt whether he acted in self-defense when he raised a brick in anger and looked directly at his mother. According to defendant, the evidence demonstrates he had just been involved in two fights with a third person, and was then pursued by a larger group which included his mother, so the evidence did not demonstrate he raised the brick offensively. In a related manner, defendant contends the instructions read to the jury did not accurately explain self-defense under the facts of his case and were misleading. Finally, defendant contends the prosecutor committed misconduct by failing to adequately prepare a witness who subsequently gave irrelevant and prejudicial testimony, by denigrating defendant's appointed counsel, and by vouching for a prosecution witness's testimony.

We conclude the record contains substantial evidence from which a reasonable jury could conclude that defendant was not acting in self-defense when he raised a brick in his hand and threatened his mother. Moreover, we conclude the trial court accurately instructed the jury on self-defense. Finally, we find no individual or cumulative prejudicial misconduct by the prosecutor. Therefore, we affirm the judgment.

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[1] Unless otherwise indicated, all further undesignated statutory references are to the Penal Code.

I.

FACTS

By amended information, the People alleged defendant committed one count of assault with a deadly weapon against his mother, T'ana. (Pen. Code, § 245, subd. (a)(1).) The People also alleged defendant suffered a June 30, 2008, conviction for burglary (Pen. Code, § 459), which constituted a serious or violent felony (Pen. Code, §§ 667, subd. (b), 1170.12, subds. (a)-(d)), and which constituted a serious felony (Pen. Code, § 667, subd. (a)(1)). Finally, the People alleged defendant suffered a February 5, 2009, conviction for possessing a controlled substance (Health & Saf. Code, § 11377, subd. (a)), and that he had previously served a prison sentence (Pen. Code, § 667.5, subd. (b)).

A.

TRIAL TESTIMONY

T'ana testified that, at 7:45 on the evening of August 6, 2012, she was in her Rancho Cucamonga home when her nine-year-old son ran inside the home yelling, "They're fighting, they're fighting." T'ana walked out the front door to see what was happening and saw her sister, Eloisa, and also saw defendant (her other son) on the ground fighting with Eloisa's boyfriend, Omar. T'ana heard her daughter, Alyssa, yelling at defendant and Omar to stop fighting, and T'ana also started yelling at defendant and Omar to stop fighting, but the two continued to fight. Omar then stopped fighting with defendant and got up off the ground. At some point, additional people came over to see what was happening.

Once defendant and Omar separated and stopped fighting, defendant ran off into the street toward traffic. Alyssa and T'ana ran after defendant into the street, and they both yelled at defendant to stop and to not run into traffic. Defendant yelled back at his sister and mother, and appeared "very angry." Omar then walked up to defendant in the street while yelling at him, and the two started fighting again. T'ana called 911. Defendant and Omar again stopped fighting, and defendant ran to a nearby wall and grabbed a brick. T'ana saw that defendant was bleeding. Defendant held the brick over his head, looked directly at T'ana, and said, "Come on, I'll take all you mother fuckers on." T'ana testified that she understood defendant's threat to be directed at her and whoever else was present, not just at her. Defendant was still "very angry," and T'ana testified she saw "the devil come out of him." T'ana testified she was afraid because "[h]e could have done anything, hurt me."

Before defendant could throw the brick, Omar came over and once again started fighting with defendant, and defendant threw the brick but it landed on the sidewalk without hitting anyone. Omar then stopped fighting with defendant, at which point T'ana's boyfriend, Michael, came out of the house and walked over. Michael told defendant that he needed to stop fighting, and then tackled defendant to ground and held him until the police arrived.

On cross-examination, T'ana testified that defendant is five feet six inches tall and weighs 190 pounds. She testified that Omar and defendant are about the same size, but that Omar is "probably a little bit smaller" than defendant.

Deputy Ortiz of the San Bernardino County Sheriff's Department testified he responded to a report of a fight. When Ortiz arrived at the scene, Michael told him that earlier in the evening defendant was at Michael and T'ana's house and started arguing with T'ana. Michael told Ortiz that later he walked outside the house and he heard defendant yelling at T'ana. Michael also said he saw defendant became very aggressive toward T'ana, that defendant lifted his arms with closed fists, and that defendant appeared to be trying to hit T'ana. Michael told Ortiz that he intervened and pushed defendant away, and he told defendant to leave the area. Michael said that defendant did not leave, but instead he grabbed a brick and, while looking directly at T'ana, he raised it up like he was going to throw it. Michael told Ortiz that he threw defendant to ground before defendant could throw the brick.

On cross-examination, Ortiz testified that he had no contact with Omar. Ortiz saw that defendant was bleeding in his mouth, and he asked Michael how defendant received his injuries. Michael told Ortiz that defendant was injured when he, Michael, threw defendant to the ground. Michael also told Ortiz that he did not punch defendant.

Roy Porraz testified that he is T'ana and Michael's neighbor. On the night in question, he heard yelling coming from T'ana's house so he walked over. He saw that defendant and T'ana were yelling at each other. Porraz testified he did not see defendant get into a physical fight with anyone, and he did not recall seeing defendant pick anything up or act as if he were going to throw anything at his mother. Porraz testified he did not

want to be in court testifying because he had things to do, and when asked by the prosecutor if he had any concerns for his safety, Porraz answered, "No."

On recall, Ortiz testified that he spoke to Porraz during his investigation. Porraz told Ortiz that he heard a lot of yelling next door, and when he walked over to see what was happening he saw defendant, T'ana, and Michael arguing with each other. Porraz also told Ortiz that he saw Michael push defendant away from T'ana. Porraz then told Ortiz that he saw defendant grabbed a brick and was about to throw it when Michael threw defendant to the ground.

Alyssa testified that she lived with her mother, T'ana. On the evening in question, she, Eloisa, and Omar were getting ready to go out. Alyssa saw defendant standing next to Omar's car in the driveway. She saw defendant throw his hands up in the air in a gesture and start to fight with Omar. Defendant and Omar fought in the driveway, but Porraz came over and separated them. After defendant and Omar were separated, Alyssa saw that T'ana came out of the house. T'ana followed defendant into the street, and Alyssa walked in the same direction, telling defendant and Omar to stop fighting and to "just go." Alyssa saw defendant grab a brick from a wall and hold it up like he was ready to throw it. T'ana was standing right behind Alyssa when defendant held the brick up in his hand.

On cross-examination, Alyssa testified that she only remembered seeing defendant and Omar fighting on the driveway. Like T'ana, Alyssa testified that defendant and Omar were roughly the same height and weight as each other.

John Earl, an investigator employed by the San Bernardino County Public Defender's Office, testified that he interviewed Alyssa at her home. Alyssa told Earl that, on the evening of defendant's fights with Omar, she saw defendant grab a piece of "mortar that connects the bricks together." Alyssa told Earl that she saw defendant hold the mortar in his hand and appeared ready to throw it, but that he dropped it and did not throw it. Alyssa did not say that defendant only dropped the brick after being tackled to the ground.

B.

JURY INSTRUCTIONS

With respect to the sole count of assault with a deadly weapon in violation of section 245, the court instructed the jury with a modified CALCRIM No. 875. Among other things, that instruction informed the jury that the People had to prove that "defendant did not act in self-defense" when he willfully committed an act with a deadly weapon other than a firearm.

The trial judge instructed the jury with a modified CALCRIM No. 3470 on the elements of self-defense, which read in part: "Self-defense is a defense to assault with a deadly weapon. The defendant is not guilty of that crime if he used force against the other person in lawful self-defense. The defendant acted in lawful self-defense if: [¶] 1. The defendant reasonably believed that he was in imminent danger of suffering bodily injury. [¶] 2. The defendant reasonably believed that the immediate use of force was

necessary to defend against that danger. [¶] 3. The defendant used no more force than was reasonably necessary to defend against that danger."

The instruction also provided that, "[w]hen deciding whether the defendant's beliefs are reasonable," the jury had to "consider all the circumstances as they were known to and appeared to the defendant and consider what a reasonable person in a similar condition with similar knowledge would have believed. If the defendant's beliefs are reasonable, the danger does not need to have actually existed." The jury was instructed that "defendant is only entitled to use that amount of force that a reasonable person would believe is necessary in the same situation," and that "[i]f the defendant used more force than was reasonable, the defendant did not act in lawful self-defense." Finally, the instruction was tailored to the alleged victim, T'ana. "If you find that T'ana Fierro threatened or harmed the defendant in the past you may consider that information in deciding whether the defendant's conduct or beliefs were reasonable. [¶] If you find the defendant knew that T'ana Fierro had threatened or harmed others in the past, you may consider that information in deciding whether the defendant's conduct or beliefs were reasonable."

C.

VERDICT, ADMISSION TO PRIOR CONVICTION, AND SENTENCE

The jury returned a guilty verdict on the sole count of assault with a deadly weapon in violation of section 245, subdivision (a)(1). In a bifurcated hearing, defendant admitted to suffering a prison prior. The prosecutor subsequently moved to dismiss the strike prior allegation, which the court granted. (§ 1385.)

The trial court sentenced defendant to the middle term of three years in state prison for the sole count of assault with a deadly weapon, and imposed a one-year sentence enhancement for defendant's admitted prison prior, to be served concurrently to the sentence on the assault conviction.

Defendant timely appealed.

II.

DISCUSSION

A.

THE RECORD CONTAINS SUBSTANTIAL EVIDENCE THAT DEFENDANT DID NOT LAWFULLY ACT IN SELF-DEFENSE WHEN HE ASSAULTED HIS MOTHER WITH A DEADLY WEAPON

In his challenge to the sufficiency of the evidence to support his conviction, defendant does not dispute that the prosecution introduced substantial evidence that he willfully threatened T'ana with a deadly weapon other than a firearm. His challenge is solely to the evidence introduced to prove he did not act in self-defense. According to

defendant, the evidence established that, after twice fighting with Omar, defendant was confronted by as many as five people and he acted defensively by grabbing the brick and trying to ward off a further attack from the group. Therefore, defendant contends no reasonable jury could have concluded that he was not acting in self-defense. We disagree.

1. *Standard of Review and Applicable Law*

"'"On appeal, '"we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." [Citation.]' [Citation.] In conducting such a review, we '"presume[] in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence." [Citation.]' [Citations.] 'Conflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.] We resolve neither credibility issues nor evidentiary conflicts; we look for substantial evidence.' [Citation.] . . ."' [Citation.] The federal standard of review is in accord. [Citation.]" (*People v. Jackson* (2014) 58 Cal.4th 724, 749.)

"'To justify an act of self-defense for [an assault charge under Penal Code section 245], the defendant must have an honest *and reasonable* belief that bodily injury is about to be inflicted on him. [Citation.]' [Citation.] The threat of bodily injury must be

imminent [citation], and '. . . any right of self-defense is limited to the use of such force as is reasonable under the circumstances. [Citation.]'" (*People v. Minifie* (1996) 13 Cal.4th 1055, 1064-1065 (*Minifie*).) Whether a defendant reasonably acted in self-defense "is determined from the point of view of a reasonable person in the defendant's position. The jury must consider all the facts and circumstances it might '"expect[] to operate on [defendant's] mind . . . ." [Citation.]'" (*Id.* at p. 1065.) Evidence that the victim of the assault threatened a defendant is relevant in determining whether the defendant acted in self-defense. (*Ibid.*) The jury may also consider evidence that a defendant was threatened by a person or persons other than the victim if the defendant reasonably associated the victim with the third party threats. (*Id*. at pp. 1065-1069.) However, "[e]vidence of third party threats is relevant only if other evidence shows fear of imminent harm," and "third party threats inherently carry less weight than threats from the victim." (*Id*. at p. 1070.)

2. *Analysis*

Defendant argues the evidence shows that, after he stopped fighting with Omar the second time, defendant was confronted by a larger group which included T'ana, Alyssa, Porraz, Omar, and Michael. He further argues the group was "clearly on Omar's side of the fight," and out of desperation he grabbed the brick and "spoke defensively to the group." But the evidence does not support the claim that he lifted the brick in the air because the group took Omar's side in the fights. T'ana testified that when she walked out of her home and saw defendant and Omar fighting, she and Alyssa yelled for "*them* to

stop," and Alyssa testified that after defendant and Omar were first separated, she told "*them* to stop and just go." (Italics added.) Michael told defendant to stop fighting and to leave, but there is no evidence he came to Omar's defense. Michael did not push defendant until after he saw defendant get aggressive with T'ana and raise his fists at her. The evidence supports the conclusion that the group who witnessed the fights between defendant and Omar were trying to break up the fights, and they did not take Omar's side.

Nor does the evidence support defendant's assertions that he was confronted or attacked by the group, and that a reasonable person in his shoes would have felt threatened by the group and would have acted in self-defense to prevent imminent bodily injury. After the first fight with Omar, defendant ran off into the street and into oncoming traffic. T'ana and Alyssa ran after defendant, but not to harm him or chastise him, and instead told defendant not to run away and not to run into traffic. In response, defendant yelled back at T'ana and Alyssa and appeared "very angry." Omar then ran up to defendant and started fighting with him again. No one else physically attacked defendant before he grabbed the brick. Rather than threaten Omar or anyone else present with the brick, defendant looked straight at T'ana, and said, "Come on, I'll take all you mother fuckers on." Although T'ana testified she believed the threat was made to her and whoever else was present, defendant did not look at anyone else when he made his threat.

Finally, the record contains no evidence that threatening T'ana with a brick was a reasonable amount of force under the circumstances. Until defendant grabbed the brick and threatened T'ana, Omar was the only person physically engaged with defendant. Both T'ana and Alyssa testified that Omar and defendant are roughly the same size and weight. Although defendant was bleeding, there is no indication in the record that Omar was getting the better of defendant or that Omar used a weapon. *After* defendant lifted the brick, Omar again engaged defendant in a fist fight, and Michael came over and tackled defendant to the ground. Under these circumstances, a reasonable person would not have escalated from using fists to grabbing a brick and lifting it up in the air as a means of self-defense. (See *People v. Enriquez* (1977) 19 Cal.3d 221, 228, disapproved on another ground in *People v. Cromer* (2001) 24 Cal.4th 889, 901, fn. 3 ["an assault [with fists] does not justify the use of a deadly weapon in self-defense"]; CALJIC No. 5.31 (Fall 2006 ed.) ["An assault with the fists does not justify the person being assaulted in using a deadly weapon in self-defense unless that person believes and a reasonable person in the same or similar circumstances would believe that the assault is likely to inflict great bodily injury upon [him] [her]"].)

In sum, the record contains substantial evidence that defendant did not act in self-defense when he assaulted T'ana with a deadly weapon, in violation of section 245, subdivision (a)(1).

B.

THE TRIAL COURT DID NOT COMMIT PREJUDICIAL ERROR WHEN IT INSTRUCTED THE JURY ON SELF-DEFENSE

Defendant contends the trial court committed instructional error because the modified CALCRIM No. 3470 read to the jury included inapplicable language about threats from the named victim in this case, T'ana, and because the instruction omitted optional language that the jury could consider threats from third persons reasonably associated with T'ana, such as Omar, when deciding whether defendant acted in self-defense. Defendant argues the inapplicable language about threats from T'ana had no place in the instruction because there was no evidence that T'ana threatened defendant, and he argues that, by focusing on T'ana to the exclusion of threats from third persons associated with her, the instruction would mislead a reasonable jury to believe that only threats from T'ana were relevant. According to defendant, the error was prejudicial under federal and state constitutional standards. We find no prejudicial error.

1. *Standard of Review and Applicable Law*

"'It is settled that in criminal cases, even in the absence of a request, the trial court must instruct on the general principles of law relevant to the issues raised by the evidence. [Citations.] The general principles of law governing the case are those principles closely and openly connected with the facts before the court, and which are necessary for the jury's understanding of the case. [Citations.]'" (*People v. Smith* (2013) 57 Cal.4th 232, 239.) An instruction that relates particular facts to the elements of the

offense is a pinpoint instruction that need not be given sua sponte, but must be requested. (*People v. Wilkins* (2013) 56 Cal.4th 333, 348-349.)

"'Generally, a party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language.' [Citation.]" (*People v. Hudson* (2006) 38 Cal.4th 1002, 1011-1012.) "'When we review challenges to a jury instruction as being incorrect or incomplete, we evaluate the instructions given as a whole, not in isolation. [Citation.] "For ambiguous instructions, the test is whether there is a reasonable likelihood that the jury misunderstood and misapplied the instruction."' [Citation.]" (*People v. Moore* (2011) 51 Cal.4th 1104, 1140.) We must presume the jury understood and applied the instructions as given. (*People v. Jackson* (2014) 58 Cal.4th 724, 767.)

As noted above, when a defendant claims self-defense, the jury may consider the effect of prior assaults and threats by the victim or persons associated with the victim against the defendant on the reasonableness of the defendant's conduct. (*Minifie*, *supra*, 13 Cal.4th at p. 1065.) A self-defense instruction concerning the effect of a defendant's knowledge of the victim's prior threats or acts of violence on the reasonableness of the defendant's conduct is not a statement of the general principles of the law of self-defense that must be given sua sponte; rather, it is a pinpoint instruction relating the particular facts of the case to the elements of self-defense and must be requested. (*People v. Garvin* (2003) 110 Cal.App.4th 484, 488-489 (*Garvin*).) We find no principled reason why a

different rule should apply to an instruction about the effect of defendant's knowledge of threats from third parties associated with the victim.

2. Additional Background

During a break in closing arguments, defense counsel argued that the modified CALCRIM No. 3470 self-defense instruction read to the jury unnecessarily focused on T'ana, and counsel expressed her concern that the jury might believe self-defense was limited to T'ana. The court agreed that the portions of the instruction which focused on T'ana were unnecessary "because we didn't have any discussions about any threats from her at all," and offered to strike the language from the instruction. The prosecutor objected, arguing "the absence of the threats is just as probative as the presence of threats," and that the instruction "calls for a named victim." In response to the prosecutor's argument, the trial court denied defense counsel's request to strike the language.

3. *Analysis*

As a threshold matter, defendant did not actually object to the alleged omission in the instruction and he did not request a pinpoint instruction on third party threats. Defendant objected that, by focusing on threats from T'ana, the modified CALCRIM No. 3470 might make the jury "believe it's limited to T'ana Fierro." The trial court offered to strike that portion of the instruction, and defendant asked that it do so. However, after the trial court overruled the objection and declined to strike the language which focused on T'ana, defendant did not request that the court additionally instruct the

jury that it could consider threats from third persons associated with T'ana, such as Omar. Had defendant requested a clarifying instruction on third party threats, the trial court might have instructed the jury with the following optional language: "[If you find that the defendant received a threat from someone else that (he/she) reasonably associated with _____ <*insert name of victim*>, you may consider that threat in deciding whether the defendant was justified in acting in (self-defense/[or] defense of another).]" (CALCRIM No. 3470.) The trial court had no sua sponte duty to give such a pinpoint instruction. (*Garvin*, *supra*, 110 Cal.App.4th at pp. 488-489.)

In any event, we find no prejudicial error. The instructions as given accurately instructed the jury that, when determining whether defendant reasonably acted in self-defense, it had to "consider *all the circumstances* as they were known to and appeared to the defendant and consider what a reasonable person in a similar condition with similar knowledge would have believed." (Italics added.) All of the circumstances relevant to the jury's decision included consideration of whether T'ana—the named victim—somehow provoked the assault. (*Minifie*, *supra*, 13 Cal.4th at p. 1065.) Although the parties introduced no evidence that T'ana threatened defendant before the assault, the jury was entitled to consider whether the evidence as a whole might lead defendant and a reasonable person in his shoes *to believe* that T'ana threatened defendant, and that defendant therefore reasonably believed force was necessary to prevent imminent physical harm. The language focusing on threats from T'ana was applicable to this case, and the trial court properly read it to the jury.

As the California Supreme Court noted in *Minifie*, evidence of third party threats carries less weight than threats from the victim when determining whether a defendant acted in self-defense. (*Minifie*, *supra*, 13 Cal.4th at p. 1070.) Even assuming the jury should have been instructed on threats from a third person such as Omar, whom defendant might have reasonably associated with T'ana, we conclude any such error was harmless under federal and state standards. (*Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Watson* (1956) 46 Cal.2d 818, 836.) As noted in the previous section, the record contains substantial evidence that defendant did not act in self-defense when he lifted the brick into the air and threatened T'ana. The evidence simply does not support defendant's assertion that he was attacked by a larger group who sided with Omar in the fist fights, and his escalation from fists to a deadly weapon was not a reasonable amount of force under the circumstances. In short, a reasonable jury would not have reached a different conclusion had the omitted instruction been given.

C.

THE PROSECUTOR DID NOT COMMIT PREJUDICIAL MISCONDUCT

Defendant contends the prosecutor committed prosecutorial misconduct (1) by not adequately preparing a prosecution witness and then eliciting inadmissible and prejudicial testimony from that witness, (2) by improperly denigrating the defense during closing argument, and (3) by improperly vouching for a witness's credibility during closing argument. Defendant argues these instances of misconduct—individually and cumulatively—constituted reversible error. Finally, to the extent defendant may have

forfeited any of these claims of prosecutorial misconduct by failing to object, he contends his appointed trial counsel rendered ineffective assistance of counsel by not objecting.

"'A prosecutor's conduct violates the Fourteenth Amendment to the federal Constitution when it infects the trial with such unfairness as to make the conviction a denial of due process. Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves the use of deceptive or reprehensible methods to attempt to persuade either the trial court or the jury.' [Citation.]" (*People v. Montes* (2014) 58 Cal.4th 809, 869.) We find no prejudicial, reversible misconduct.

1. *The Prosecutor Did Not Commit Prejudicial Misconduct by Unintentionally Eliciting Inadmissible Testimony*

a. Applicable Law

Intentionally eliciting inadmissible testimony constitutes prosecutorial misconduct; it is not misconduct to merely elicit testimony. (*People v. Mills* (2010) 48 Cal.4th 158, 199.) Moreover, we do not fault a prosecutor when a witness gives a nonresponsive answer that the prosecutor did not solicit and could not have anticipated. (*People v. Tully* (2012) 54 Cal.4th 952, 1035 (*Tully*); *People v. Valdez* (2004) 32 Cal.4th 73, 125 (*Valdez*).) The prejudice from a witness's improperly volunteered statement is usually cured by an order striking the statement and an admonition to the jury to disregard. (*People v. Navarrete* (2010) 181 Cal.App.4th 828, 836 (*Navarette*).)

b. Additional Background

As noted, Porraz testified that he did not want to be in court testifying because he had things to take care of. When asked if he was concerned for his safety or about repercussions from his testimony, Porraz answered, "No." During Ortiz's testimony, he testified that both he and Porraz were present in the prosecutor's office earlier that morning, and that he recalled Porraz's testimony that he did not want to testify. Ortiz testified that he heard Porraz say "he didn't want to testify because of the neighborhood he lived in," and he "was concerned about his kids and his family's safety." The prosecutor then asked Ortiz, "Why would he be concerned about neighborhood repercussions of his coming to court and testifying in this matter?" Ortiz answered, "Basically because of [defendant's] gang involvement." The trial court sustained defense counsel's objection to Ortiz's answer on relevancy grounds and instructed the jury to "disregard gang involvement. That's not part of this case [and] [h]as nothing to do with this case. And just put it out of your minds. There's absolutely nothing to do with what you heard in this matter at all." After the close of evidence, the trial court instructed the jury with CALCRIM No. 222 to disregard testimony stricken from the record and to "not consider that testimony for any purposes."

After the People rested, defense counsel addressed Ortiz's testimony about Porraz's reluctance to testify because of defendant's gang affiliations. According to counsel, the prosecutor told her he would not be asking about gang membership, and both the prosecutor and Ortiz knew better than to mention gang membership in light of the

trial court's earlier ruling on Evidence Code section 402 motions that character evidence such as drug use or arrests would not be admissible. Counsel argued the prosecutor's misconduct was not cured by the trial court's admonition to the jury, and she asked for a mistrial.

The trial court noted its surprise at Ortiz's testimony because, up to that point, no mention had been made about gang involvement. Nonetheless, the court concluded the brief mention by Ortiz of gang involvement was unintentional, and that the court's stern admonition to the jury was sufficient. The court therefore denied the request for a mistrial, and further denied the request to strike Porraz's and Ortiz's testimony.

The prosecutor explained that his question to Ortiz was not meant to elicit testimony about defendant's possible gang involvement, but merely to elicit testimony that Porraz was concerned about "the neighborhood being a gang neighborhood." The trial court accepted this explanation. "It was simply you asked a rather open-ended question about Mr. Porraz and what he said about his reluctance or his fear in testifying and Deputy Ortiz gave an answer. You didn't ask him specifically about gangs. No one said you did."

Finally, at the beginning of her closing argument, defense counsel told the jury that the case was not about gang affiliations. She reminded the jury that she had objected to Ortiz's testimony about gang affiliations, and that the trial court had sustained the objection. She reiterated that no evidence of gangs was admitted because this was not a gang case. Counsel told the jury that she objected to testimony about gang affiliations

and about defendant's poor relationship with his mother because the jury could not find defendant guilty based on his bad character, and she told the jury the only reason the prosecutor brought up such things was "to dirty" defendant.

c. Analysis

We find no misconduct with respect to the prosecutor's examination of Ortiz. The record does not support the conclusion that the prosecutor intentionally elicited inadmissible testimony or that he otherwise violated the trial court's pretrial orders. During a pretrial hearing, the trial court granted defendant's motion to exclude testimony about defendant's drug or alcohol use and about his prior arrests. Defendant did not move to exclude evidence about his possible gang involvement and, therefore, the trial court made no ruling precluding such testimony. The record indicates that the prosecutor informed defense counsel about what Porraz said out of court on the morning of his testimony, and that he would not be asking Porraz about defendant "being a gang member."

The prosecutor did not, in fact, ask Ortiz if Porraz was afraid of testifying because of defendant's possible gang involvement. Rather, the prosecutor asked Ortiz if he heard Porraz say why he was reluctant to testify, and Ortiz testified that Porraz said he was afraid for the safety of his family because of the neighborhood he lived in. It was in response to the prosecutor's follow-up question about "*neighborhood repercussions* of [Porraz] coming to court" that Ortiz testified about defendant's gang involvement. (Italics added.) On this record, we conclude the prosecutor cannot be faulted for Ortiz

testifying about defendant's gang involvement in response to a question about Porraz's neighborhood. (*Tully*, *supra*, 54 Cal.4th at p. 1035; *Valdez*, *supra*, 32 Cal.4th at p. 125.)

Nor do we find any prejudice. (*Chapman v. California*, *supra*, 386 U.S. at p. 24; *People v. Watson*, *supra*, 46 Cal.2d at p. 836.) Porraz's testimony about defendant's gang involvement was brief, and the trial court immediately sustained defendant's objection and struck the testimony from the record. The trial court then admonished the jury to disregard the testimony because this was not a gang case, and the court properly instructed the jury to disregard stricken testimony. Moreover, defense counsel opened her closing argument by imploring the jury not to consider the stricken testimony about defendant's gang involvement. Given that this was not a close case, and that the evidence of self-defense was rather weak, the trial court's admonition and instructions cured any prejudice from the jury hearing the brief comment. (*Navarrete, supra,* 181 Cal.App.4th at p. 836.)[2]

2. *The Prosecutor Did Not Denigrate Defense Counsel During Closing Argument*

a. Applicable Law

Denigration of defense counsel by the prosecutor is improper because it directs the jury away from the evidence and the relevant issues in the trial. (*People v. Pearson*

[2] Defendant does not directly challenge the trial court's order denying his motion for a mistrial. Because we find no prejudicial misconduct during the prosecutor's examination of Ortiz, we additionally conclude the trial court did not abuse its discretion by denying the motion for mistrial. (*Valdez*, *supra*, 32 Cal.4th at p. 128.)

(2013) 56 Cal.4th 393, 431.) "'In addressing a claim of prosecutorial misconduct that is based on the denigration of opposing counsel, we view the prosecutor's comments in relation to the remarks of defense counsel, and inquire whether the former constitutes a fair response to the latter.' [Citation.]" (*Id.* at pp. 431-432.)

b. Additional Background

During closing arguments, the prosecutor told the jury that his burden of proof on the elements of the charged offense was beyond a reasonable doubt, and he asked the jury to not hold him to a lower or higher burden of proof. In her argument, defense counsel responded by telling the jury that the standard of proof beyond a reasonable doubt was "the highest standard you can possibly have," and she asked the jury not to let the prosecutor "water down his burden of proof," and instead to hold the prosecutor to the standard of "eras[ing] all reasonable doubt."

With respect to the elements of the crime of assault with a deadly weapon, defense counsel argued the main issue was whether the prosecution had proved beyond a reasonable doubt that defendant did not act in self-defense when he raised the brick up in his hand. Defense counsel argued that defendant acted in self-defense because, even after he disengaged from fighting with Omar and tried to get away, defendant was verbally harassed by a number of people and attacked again by Omar. She also argued that the jury should not focus solely on T'ana when determining whether defendant acted in self-defense.

In rebuttal, the prosecutor told the jury, "Well, I'm willing to bet as you listened to the defense's closing argument you learned a few things about the law you didn't know before. And if you're thinking that, you weren't the only one." Defense counsel objected, contending the prosecutor's statement was "improper closing, [and] disparaging [to] defense counsel." The trial court overruled the objection. The prosecutor told the jury that defense counsel incorrectly described the standard of proof beyond a reasonable doubt, and he argued to the jury that he was not required to prove his case "beyond absolute certainty" or to "eliminate all doubt."

The prosecutor argued there was no dispute on the first four elements of the crime, which explained the defense's focus on self-defense. "We have a case where every witness agrees that the defendant picked up a brick and was preparing to throw it at his mother. Everyone's statements lined up in that regard. What do you do with that? You have to do something. You have to put on a defense. What do you have to work with? Well, the first four elements, everyone agrees, he did that. So what does that leave? Well, he got into this fistfight with Omar earlier. Maybe we can squeeze that in here so that it absolves him of assaulting his mother with this brick. You got to argue something. That's what the defense has elected to do. It's not that I'm downplaying self-defense, it's that that's what the defense is focusing on. Because that's what they found that they might be able to get one of you to go with."

c. Analysis

The prosecutor's remark about learning something new about the law, in response to defense counsel's assertion that the jury should hold him to the highest standard of proof, does not constitute misconduct. The prosecutor was permitted to comment on what he believed to be an incorrect statement of the burden of proof beyond a reasonable doubt and to correctly articulate that standard. One sarcastic remark from the prosecutor does not constitute prosecutorial misconduct. (See, e.g., *People v. Mendoza* (2007) 42 Cal.4th 686, 701 [prosecutor's "needlessly sarcastic" retort to defense examination of a witness was not misconduct]; *People v. Hillhouse* (2002) 27 Cal.4th 469, 502-503 [two sarcastic statements by the prosecutor about a defense expert's testimony and in response to defense counsel's argument were not misconduct].)

With respect to the prosecutor's commentary on the theory of self-defense, defendant forfeited his challenge by not objecting and requesting an admonition. "'"To preserve a misconduct claim for review on appeal, a defendant must make a timely objection and ask the trial court to admonish the jury to disregard the prosecutor's improper remarks or conduct, unless an admonition would not have cured the harm."' [Citation.]" (*People v. Sattiewhite* (2014) 59 Cal.4th 446, 480 (*Sattiewhite*).) Even if defendant did not forfeit this claim, we find no misconduct. The prosecutor merely pointed out that defense counsel had effectively conceded all of the elements of the crime except for self-defense and that she had to argue something. To the extent the jury might have taken the prosecutor's comments to be sarcastic, defense counsel was not subjected

to a "'constant barrage'" of sarcasm that constituted misconduct and that would excuse an otherwise futile objection and request for admonition. (*People v. Dykes* (2009) 46 Cal.4th 731, 775, quoting *People v. Hill* (1998) 17 Cal.4th 800, 821.) Because we find no misconduct, defense counsel did not render ineffective assistance of counsel by not objecting.

3. *The Prosecutor Did Not Improperly Vouch for T'ana's Credibility*

a. Applicable Law

The prosecutor is not permitted to personally vouch for the credibility of his or her witnesses because it inserts into the trial facts outside the record and unknown to the jury. (*People v. Huggins* (2006) 38 Cal.4th 175, 206-207.) However, in closing arguments, the prosecutor is permitted to argue to the jury that, under the circumstances of the case, a witness is telling the truth. (*People v. Boyette* (2002) 29 Cal.4th 381, 433; *People v. Fernandez* (2013) 216 Cal.App.4th 540, 561.)

b. Additional Background

Defense counsel argued that the witnesses were not reliable, and that the jury could disregard all of their testimony if it concluded the witnesses were lying. The prosecutor responded by telling the jury that he believed Porraz and Michael did lie, but he asked the jury not to conclude that T'ana lied. "You saw her emotional state, she wasn't happy. You think she was lying when she got up here and testified against her son?" The prosecutor told the jury that "the problem is usually moms getting up here and lying to get their son off the hook, not the other way around." The prosecutor argued

T'ana was courageous in testifying, and that "[s]he came in here and told you the truth." He also told the jury, ". . . a mother knows. This is her boy. She's known him all his life, knows what he's capable of. She was afraid he was going to hit her with [the brick], [and it] took a lot of courage for her to come in here and hold him accountable. A lot of moms wouldn't." Therefore, the prosecutor asked the jury to "back her up."

c. Analysis

Once again, defendant forfeited his assertion of error by not objecting that the prosecutor improperly vouched for T'ana's credibility, and by not requesting a jury admonition. (*Sattiewhite*, *supra*, 59 Cal.4th at p. 480.) We nonetheless find no misconduct. The prosecutor did not personally vouch for T'ana's credibility. Rather, he argued that, based on the circumstances of the case, the jury should find T'ana to be a believable witness. The trial court properly instructed the jury with CALCRIM No. 226 that, when determining whether a witness's testimony was credible, the jury could rely on its "common sense and experience." Moreover, we find no prejudice. (*Chapman v. California*, *supra*, 386 U.S. at p. 24; *People v. Watson*, *supra*, 46 Cal.2d at p. 836.) As already stated, this was not a close case, and the record does not contain substantial evidence from which a reasonable jury would conclude that defendant acted in self-defense. Because the prosecutor did not prejudicially vouch for T'ana's credibility, failure to object was not ineffective assistance of counsel.

4. *No Cumulative Error*

Finally, because we conclude the prosecutor did not commit any prejudicial misconduct during his examination of Ortiz or during closing arguments, we find no reversible cumulative error either. (*People v. Collins* (2010) 49 Cal.4th 175, 208.)

III.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

McKINSTER
J.

We concur:

RAMIREZ
P. J.

CODRINGTON
J.